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No. 83-1310

In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., et al.,
Petitioners,

v.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are cited in the Table of Authorities. The text of Colorado statutes is printed in the Appendix. Other cited statutory authorities are reproduced in the petition.

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SUMMARY OF THE ARGUMENT

Petitioners assert that private landowners acquiring land by patent from the federal government also acquired a common law ownership right in ground water lying beneath the land. They contend that the State of Colorado has always recognized the absolute ownership of nontributary ground water by the overlying landowner, and that the Colorado Supreme Court's decision in *State v. Southwestern Colorado Water Conservancy District*, 671 P.2d 1294 (Colo. 1983) (hereinafter referred to as *Huston*), effected an unpredictable change in state law, resulting in an unconstitutional taking without just compensation of petitioners' property rights. Petitioners also allege the decision impaired contracts that, though not in the record, are "presumed" to exist and to have been relied upon.

Finally, they claim that the court's opinion has taken from the United States government the nontributary water underlying its land has deprived it of the power to own or convey that water to a patentee. None of these assertions can survive scrutiny, and none merits review.

Numerous decisions of this Court have held that a state may change common law rules with respect to use and control of underground water, and such a change does not effect a taking of private property without just compensation. Because this issue has been foreclosed by the Court's prior decisions, no substantial federal question is presented.

This Court has long held that state law defines the property rights of landowners in relation to the state or other private parties. This rule is particularly applicable to water rights, which the Court has repeatedly held are governed by state and local laws and customs. In reliance on these decisions, the western states have developed their own systems for the use and allocation of water. Reconsideration of this deferential approach would upset the water rights systems of the western states and the populations and economies developed in reliance thereon.

The decision of the Colorado Supreme Court does not violate the contract clause of the United States Constitution. That clause applies only to legislation.

No reserved water rights of the United States were impaired by this decision. The supreme court recognized the existence of such rights and expressly disapproved the contrary opinion of the special water judge.

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ARGUMENT

I.

An Alleged Change in the Common Law Rules Governing the Use and Allocation of Underground Water Within the State Does Not Work an Unconstitutional Taking of Private Property Rights.

Petitioners' taking argument is based upon two premises: (1) that the common law rule of absolute ownership of ground water as an incident of surface ownership prevailed in Colorado prior to *Huston;* and (2) that the *Huston* decision represented such a sudden and unexpected change in property law, it raises the kind of constitutional just compensation issue suggested in Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 294-98 (1967).[1]

Colorado has never recognized a common law ownership right in nontributory[2] ground water. *See* part II.B,

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1. Petitioners, in an effort to create a conflict sufficient to support discretionary review, sweepingly assert that *Huston* is contrary to this Court's holding in *Hughes*. Petition at 9. Their argument demonstrates, however, that it is solely the concurring opinion and *not* the ruling in *Hughes* — that federal common law determines title to oceanfront accretions — upon which they rely. Petition at 5-9.

2. Under Colorado law ground water is classified as being tributary, nontributary, or designated ground water (within a designated ground water basin). Ground water the withdrawal of which will not influence the rate or direction of flow of a natural surface stream within 100 years is considered to be nontributary. *District 10 Water Users Association v. Barnett*, 198 Colo. 291, 599 P.2d 894 (1979); *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *cert. denied*, 421 U.S. 996 (1975); *see State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981); *Safranek v. Town of Limon*, 123 Colo. 330, 228 P.2d 975 (1951).

infra. Even assuming *arguendo* that it had, the power of the state to replace rules of common law with statutory or decisional doctrines better suited to changing conditions and the public interest cannot at this late date be denied. As this Court stated in *United States v. Rio Grande Dam & Irrigaion Co.*, 174 U.S. 690, 702-03 (1899):

> While . . . [the riparian doctrine with respect to surface waters] obtains in those states in the Union which have simply adopted the common law, . . . as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.

Accord, e.g., California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

Numerous other states have rejected the common law ownership theory of ground water. *E.g., Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) (also rejecting claim of a taking without just compensation), *appeal dismissed*, 457 U.S. 1101 (1982) (no substantial federal question); *Baker v. Ore-Ida Foods*, 95 Idaho 575, 513 P.2d 627 (1973); *Hinton v. Little*, 50 Idaho 371, 296 P. 582 (1931); *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) (also rejecting just compensation claim), *appeal dismissed*, 375 U.S. 7 (1963) (no substantial federal question); *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950) (also rejecting just compensation claim, and holding federal patents conveyed no interest in ground water), *appeal dismissed*, 341 U.S. 924 (1951) (no substantial federal question, citing *Beaver Portland Cement Co., supra*); *Baeth v. Hoisveen*, 157 N. W.2d 728 (N.D. 1968) (also rejecting just compensation claim); *Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964) (same, and holding federal patents conveyed no

rights in water). *See also Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan.), *aff'd*, 352 U.S. 863 (1956). This Court's summary affirmances and dismissals for want of a substantial federal question are binding on lower courts as decisions on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Court in these decisions has consistently and repeatedly indicated its agreement with the result reached by the *Huston* court. *Sporhase v. Nebraska*, 458 U.S. 941, 949 (1982); *Metromedia v. City of San Diego*, 453 U.S. 490, 499 (1981).

Even if the *Huston* decision had reversed established precidential authority, "the mere fact that the state court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924). *See Great Northern Railroad v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932). This rule has been expressly applied in a challenge to state statutory provisions abrogating the common law ownership rule of ground water. *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan.), *aff'd*, 352 U.S. 863 (1956). There, the common law doctrine had been enunciated in numerous opinions of the Kansas Supreme Court. Noting that the latest state supreme court decision on the issue "must be regarded as having overruled the earlier cases," the three-judge panel held, *inter alia*:

> There is no vested right in the decisions of a court and a change of decision does not deprive one of . . . property without due process of law.
>
> Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property . . . .

145 F. Supp. at 625 (footnotes omitted). *Accord Sunray Oil Co. v. Commissioner*, 147 F.2d 962 (10th Cir. 1945).

Cf. Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (overruling prior Supreme Court decision on property rights).

Petitioners have cited no authority suggesting, contrary to the foregoing decisions of this Court, that abrogation of the common law private ownership doctrine raises a constitutional just compensation issue, or any other substantial federal question. Since the issues asserted by petitioners have "been so explicitly decided by this court as to foreclose further argument on the subject . . . the Federal question relied upon [is] devoid of any substantial foundation or merit." *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 314 (1902). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-56 (1924).

II.

Adopting Petitioners' View Would Upset Long Settled Legal Expectations Established By the Prior Decisions of This Court and By Colorado Law.

A. State law controls the definition and delineation of property rights such as those asserted here.

It is well established that

> [u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and *defines the rights of its owners in relation to the state or to private parties*, is found in the statutes and decisions of the state." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944).

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) (emphasis added). The *Corvallis* Court reaffirmed the following language from *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839):

> We hold the true principle to be this, that whenever the question in any court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation . . . .

429 U.S. at 377.

Perhaps nowhere is the federal deference to state law on the definition of property rights more clearly present than in matters involving water rights in the western states. For more than a century both Congress and this Court have consistently recognized and deferred to the authority of the western states to create, define, regulate, and control rights and interests in the appropriation, distribution, and use of waters within their borders. *E.g., California v. United States*, 438 U.S. 645, 653-63 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 395 U.S. at 165. *See also Kansas v. Colorado*, 206 U.S. 46, 93 (1907) ("It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including beds of streams and other waters."). The plenary power of the states to adopt their own systems for the acquisition, use, and distribution of waters in accordance with the public interest is subject only "to the prohibitions against interference with federal reserved rights, with interstate commerce, and with the navigability of any navigable waters." *Huston*, 671 P.2d at 1307.

Petitioners argue that there is another exception to the state's authority. They contend that federal patentees obtained, by common law, ownership rights in the nontributary ground water[3] beneath the land conveyed, and that those rights could not subsequently be impaired without payment of compensation.

The Colorado Supreme Court, consistent with this Court's decisions, looked to federal law on the question whether nontributary ground water was severed from the realty when the latter was patented to private parties. *Huston*, 671 P.2d at 1304-07. *See also United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982). The court's opinion ably and thoroughly discusses the federal legislative and judicial authorities[4] which have long established that "the water *above and beneath the surface* of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." S. Rep. No. 775, 82d Cong., 1st Sess. 3 (1951) (emphasis added) (report on the McCarran Amendment, codified at 43 U.S.C. §666 (1976), and quoted with approval in *California v. United States*, 438 U.S. at 678, as "[p]erhaps the

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3. The common law did not recognize "nontributary" as a ground water classification. See note 5, *infra* p. 11.

4. *E.g.*, Act of July 26, 1866, ch. 262, sec. 9, 14 Stat. 251, 253 (codified at 30 U.S.C. §51 (1976)); Act of July 9, 1870, ch. 235, sec. 17, 16 Stat. 217, 218 (codified at 30 U.S.C. §52 (1976)); Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§321-29 (1976)); *California v. United States*, 438 U.S. 645, 653 (1978); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 614 (1978); *Ickes v. Fox*, 300 U.S. 82 (1937); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Kansas v. Colorado*, 206 U.S. 46, 93 (1907).

most eloquent expression of the need to observe state water law . . .").

The policies that this Court has recognized as the foundation for federal deference to state control of water rights are as applicable to ground water as to surface water. Significantly, in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), this Court refused to draw an arbitrary distinction between the policies and rules governing acquisition of surface water rights and those governing ground water. There, the Court decided the issue "[w]hether water is a locatable mineral under the Mining Law of 1872." *Id.* at 610. The specific water involved was underground water. *Id.* at 606. Citing provisions in the Mining Law of 1872 involving water rights and the decisions of this Court construing those and earlier statutory provisions, the *Charlestone Stone Products* Court held:

> Congress . . . expressly provided a water rights policy in the mining laws. But the policy adopted is a "passive one, . . . ; Congress three times (in 1866, 1870 and 1872) affirmed the view that private water rights on federal lands were to be governed by state and local law and custom. It defies common sense to assume that Congress, when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights . . . .

436 U.S. at 614. Particularly relevant is the *Charlestone Stone Products* opinion's discussion of policy considerations weighing against a conclusion that ground water could be claimed under the mining laws.

> Many problems would undoubtedly arise simply from the fact of having two overlapping systems for acquisition of private water rights . . . .
>
> • • •
>
> . . . A federal claimant could, for example, utilize all of the water extracted from a well like respond-

> ent's, without regard for the settled prior appropriation rights of another user of the same water. Or he might not use the water at all and yet prevent another from using it, thereby defeating the necessary Western policy in favor of "actual use" of scarce water resources. [Citation omitted.] As one respected commentator has written, allowing water to be the basis of a valid mining claim "could revive *long-abandoned common law rules of ground water ownership and capture, and . . . could raise horrendous problems of priority and extralateral rights.*" We decline to effect so major an alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history.

436 U.S. at 615-16 (emphasis added) (footnotes omitted). In precisely the same manner, approval of petitioners' theory of ownership of nontributary ground water, based upon "an overly literal reading" of nineteenth century statutes, would work a "major . . . alteration in established legal relationships," in derrogation of the state's recognized authority to control the use and distribution of water within its borders.

B. Colorado has never recognized the property interests petitioners assert as an incident of ownership of the overlying land.

It is within the authority of the state to determine "whatever incidents or rights attach to the ownership of property conveyed by the government." *Packer v. Bird*, 137 U.S. 661, 669 (1891), quoted with approval in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. at 380. The State of Colorado, like virtually all western states, has exercised its prerogative to adopt the rules it deems in the best interest of its citizens to govern the ownership, use, and/or acquisition of rights to nontributary ground water.

Petitioners base their argument that Colorado recognized ground water ownership in overlying landowners on statements in *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963). The passage upon which they rely is dictum, unsupported by any other Colorado decisional or legislative authority.

As early as 1893, the Colorado Court of Appeals suggested that Colorado courts would reject the common law classifications of ground water.[5] *McClellan v. Hurdle*, 3 Colo. App. 430, 434, 33 P. 280, 282 (1893). *Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913), held that when seepage or percolating water is tributary to a stream, it is a part thereof and subject to the constitutional doctrine of prior appropriation. *Id.* at 255-56, 133 P. at 1111. Subsequently, in *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929), the supreme court flatly rejected the common law distinction between "underground streams" and "percolating groundwater":

> The argument of the defendants, based on decisions from other states, that percolations belong to the owner of the soil, is unsound in Colorado. Ever since *Comstock v. Ramsay*, . . . we have held that seepage and percolation belong to the river . . . .

These cases refute any claim that percolation or seepage of any water belongs to the landowner, and fix

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5. The common law distinguished between "underground streams" and "percolating ground water." In both riparian and appropriative jurisdictions, the same rules applicable to surface streams generally applied to underground streams. Percolating ground water, on the other hand, was generally governed at common law by one of three rules: the English rule of absolute ownership; the American rule of reasonable use; or the doctrine of correlative rights. *See generally State v. Michels Pipeline Construction*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

> the principle that any appropriation of it must be subject to all prior appropriations from the river . . . .

86 Colo. at 181-82, 279 P. at 45. Since the court, however, confined its decision to such waters as "belong to the stream," *id.* at 183, 279 P. at 46, the law that would apply to nontributary ground water was left undecided.

In *Safranek v. Town of Limon*, 123 Colo. 330, 228 P.2d 975 (1951), the court addressed the law of nontributary ground water. There the appellant landowner asserted: "In this State percolating sub-surface waters, not tributary to any stream, are the property of the owner of the land, as at common law." *Id.* at 334, 228 P.2d at 977. After a survey of its prior decisions, the court stated:

> Had it been established by the record in this case that the water diverted by the town was nontributary ground water, such as an underground lake, the waters of which are not a part or a source of a natural stream, still the above-quoted statement upon which counsel for tht respondents base their claim of ownership of the water would *not be a correct statement of Colorado law. We have long since departed from the English common-law doctrine of ownership of percolating waters by the surface owner, Nevius v. Smith, supra,* and we would, in such case, be confronted with the question upon which there is an absence of statutory law in Colorado as well as direct decision by our courts. Whether in such case we should follow the California doctrine of reciprocal rights, developed from its law of riparian rights, or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined.

Id. at 335-36, 228 P.2d at 978 (emphasis added). *Safranek* thus recognized that the very ownership theory upon which petitioners' arguments here are predicated had long since been rejected. It left open only the question of what doc-

trine *other than ownership* it might apply when called upon to rule in an appropriate case.

In *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), the Colorado Supreme Court directly addressed the question whether nontributary ground water was subject to appropriation under the Colorado constitution and surface water management statutes. There the court succinctly stated the "controlling question" presented: "whether the doctrine of prior appropriation of water to beneficial use is applicable to underground waters which are not tributary to any natural stream, and so results in a priority of right to the water thus used." *Id.* at 163, 385 P.2d at 134-35. Based on the Colorado Constitution and the controlling state statutes, the court answered that question in the negative. Instead, it found that the general assembly contemplated "an equitable and efficient use of nontributary underground water not pursuant to any theory of appropriation." *Id.* at 169, 385 P.2d at 138 (emphasis deleted).

In clear dictum, the *Whitten* court addressed the question that the *Safranek* court had expressly declined to decide. It "approve[d] the language" of a law review article stating in pertinent part:

> It is submitted that the basis [for administering nontributary ground water] should not be, and is not, based on priority of diversion. The land owner has property in the water in his soil. It is a vested right which cannot be taken away by mere legislation. It is subject only to the reasonable use doctrine. If the ground water is in motion so as to be tributary to a natural stream, or part of the stream water table, it has always been subject to priorities of appropriation on the natural stream. But unless it is tributary to the natural stream, it is not subject to the law of appropriation.

153 Colo. at 173-74, 385 P.2d at 140. No question of *ownership* of nontributary ground water was relevant or necessary to the court's decision. Moreover, the law review article cited by the court has subsequently been shown to have been without foundation in Colorado law. Note, *Colorado Water Law*, 47 Den. L. J. 226, 312-16 (1970).

The Colorado General Assembly quickly rejected any notion that *Whitten* might have created of a common law ownership right in the overlying landowner. In the Ground Water Management Act of 1965, Colo. Rev. Stat. 37-90-101 *et seq.* (1973), it applied a modified doctrine of prior appropriation to "designated ground water," which includes nontributary ground water, an action clearly inconsistent with the argument of petitioners. Colo. Rev. Stat. 37-90-103(6) (1973); *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981). *See also* Colo. Rev. Stat. 37-92-103(11) (1973); *District 10 Water Users Association v. Barnett*, 198 Colo. 291, 599 P.2d 894 (1979); *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *cert. denied*, 421 U.S. 996 (1975).

Outside the boundaries of designated ground water basins, the 1965 Act provided that no new wells could be constructed, nor the supply of water from an existing well enlarged, unless the user applied to the state engineer for a "permit to construct a well." Colo. Rev. Stat. 37-90-137(1) (1973). In 1973 the general assembly amended the Ground Water Management Act to more carefully control the use of nontributary ground water. Colo. Rev. Stat. 37-90-137(4) (1973). The amendment provided protection for existing users of such water outside the boundaries of designated ground water basins while limiting the class of persons entitled to use such water and the rate at which the

resource could be consumed. *See also* Colo. Rev. Stat. 37-82-101(1) (Supp. 1983) (enacted in 1979).

As the foregoing authorities demonstrate, the common law ownership theory petitioners advance has never been legislatively or judicially recognized in Colorado and the decisions of Colorado appellate courts have so indicated since at least *Comstock v. Ramsay* in 1913. For this Court to embark on a different course at this late date would upset not only the state procedures for the allocation of water, but also the many water rights established and used under the authority of state law. Such a result is wholly unwarranted.

III.

The Contract Clause Does Not Apply to Judicial Decisions.

Petitoners claim that the *Huston* decision violates the contract clause. U.S. Const. art. I, sec. 10. "The short answer to this contention is that this provision, as its terms indicate, is directed against legislative action only." *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. at 451-54.

IV.

No Water Rights of the Federal Government Were Impaired By the Huston Decision.

Petitioners contend that in the *Huston* decision "the Colorado Supreme Court has seized the nontributary ground water underlying land of the United States and deprived the United States Government of the power to own or to convey that water to a patentee." Petition at 15. This assertion is wholly without merit.

As to lands remaining within the public domain, it was settled over a century ago that state law governs the delineation and acquisition of water rights. Desert Land Act, Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§321-29 (1976); *California v. United States*, 438 U.S. 645 (1978); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978) (ground water); *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Huston*, 671 P.2d at 1304-07; *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982).

It has also long been recognized that this state authority over water is subject to certain limitations among which is the federal government's "authority to reserve unappropriated water . . . for use on appurtenant lands withdrawn from public domain for specific federal purposes." *United States v. New Mexico*, 438 U.S. 696, 698 (1978). In *Huston*, the special water judge opined[6] "that the federal government has no rights to water underlying lands reserved to it from the public domain." 671 P.2d at 1323. The federal government appealed. The Colorado Supreme Court disposed of the matter in a single paragraph.

> In [*United States v. City and County of Denver*], contrary to the opinion of the special water judge, we recognized the existence of federal reserved rights in certain circumstances and explained their nature and incidents. We therefore disapprove of the opinion expressed by the special water judge on this issue.

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6. The decision of the special water judge is printed in the appendix to the petition at App. 1-54.

Id. Thus, the *Huston* decision can hardly be said to have "seized" the property of the United States government.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the petition for certiorari.

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APPENDIX

37-82-101 (1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream. The waters of natural streams of Colorado do not include underground waters not in or tributary to natural surface streams nor underground waters which, when withdrawn, do not impair the flow of natural surface streams. All waters not in or tributary to a natural stream, as described in this subsection (1), shall be subject to such administration and use as the general assembly may provide by law. Such nontributary waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority.

37-90-103 (6) (not including 1983 amendment) "Designated ground water" means that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin.

37-90-137 (1) From and after May 17, 1965, no new wells shall be constructed outside the boundaries of a designated ground water basin, nor the supply of water from existing wells outside the boundaries of a designated

ground water basin increased or extended, unless the user makes an application in writing to the state engineer for a "permit to construct a well", in a form to be prescribed by the state engineer. The applicant shall specify the particular designated aquifer from which the water is to be diverted, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the average annual amount of water applied for in acre-feet per year, the proposed maximum pumping rate in gallons per minute, and, if the proposed use is irrigation, a description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the state engineer may designate on the form prescribed.

37-90-137 (4) In the issuance of a permit to construct a well in those aquifers which do not meet the definitions of section 37-90-103 (6) or section 37-92-103 (11), and do not meet the exemptions set forth in section 37-90-105 and 37-92-602, the provisions of subsections (1) and (2) of this section shall apply; except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant or by the owners of the area, by their consent, to be served is considered to be unappropriated; the minimum useful life of the aquifer is one hundred years, assuming that there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the granting or denial of permits to construct wells and for the administration of this underground water.

37-92-103 (11) "Underground water" as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream. Such "underground water" is considered different from "designated ground water" as defined in section 37-90-103 (6).